JAKS ISLAND CIRCLE SDN BHD v. STAR MEDIA GROUP BHD & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C(ARB)-11-02-2018 & WA-24C(ARB)-12-02-2018]
6 SEPTEMBER 2019

TORT: *Damages – Assessment – Application for – Assessment of damages arising from undertaking to pay damages in event injunctions applied for were set aside – Whether undertaking ought to be enforced – Whether application for assessment of damages pursuant to undertaking premature – Whether there was justification for postponing assessment of damages – Whether assessment of damages ought to wait until outcome of arbitration – Whether special circumstances arose – Whether losses arose out of injunction orders proven – Whether assessment of damages foreseeable and fair*

The plaintiff initiated proceedings to restrain the first defendant, Star Media Group Berhad ('Star Media'), from receiving the bank guarantees in the sum of RM25,000,000 each from the second defendant, AmBank (M) Berhad and United Overseas Bank (Malaysia) Berhad ('UOB'). The plaintiff had given its undertaking as to damages that Star Media may suffer arising out of the injunction applied for, in its affidavits in support of the injunction applications. The High Court granted the plaintiff an *ad interim* injunction ('*ad interim* HC injunction') pending disposal of the plaintiff's originating summonses ('OSs'), which were later dismissed ('High Court order.') Dissatisfied, the plaintiff appealed against the High Court order ('the civil appeals'). Pending the hearing of the plaintiff's civil appeals, the plaintiff applied for an *Erinford* injunction before the High Court to restrain Star Media from receiving payment under the bank guarantees pending the disposal of the civil appeals ('HC *Erinford*'). The High Court granted an *ad interim* HC *Erinford* injunction pending the disposal of the *inter partes* hearing. The HC *Erinford* was heard and dismissed by the High Court with costs. The plaintiff, with dogged determination, applied to the Court of Appeal for a similar *Erinford* injunction pending disposal of the civil appeals ('COA *Erinford*'). The Court of Appeal dismissed the COA *Erinford*. The plaintiff then pommelled itself to pursue further and exhaust all avenues of appeal. The plaintiff filed a motion for leave to appeal to the Federal Court against the Court of Appeal's decision in dismissing the COA *Erinford* ('FC civil leave *Erinford* applications 391 and 392'). The Court of Appeal dismissed the plaintiff's civil appeals and affirmed the High Court order ('COA order').

The plaintiff then made an oral application for a fresh *Erinford* injunction pending its leave to appeal to the Federal Court, which was dismissed by the Court of Appeal. Dissatisfied, the plaintiff filed a motion for leave to appeal to the Federal Court against the COA order in dismissing the civil appeals *via* Federal Court ('FC civil injunction leave applications 569 and 571'), which made the FC civil leave *Erinford* applications 391 and 392 redundant and withdrawn. The plaintiff thereafter obtained an interim injunction from the Federal Court pending the disposal of civil applications 569 and 571, which was dismissed by the Federal Court ('FC order'). Subsequently, the bank guarantees in the sum of RM25,000,000 each was released to Star Media by AmBank and UOB following the FC order. The key issue in these two related applications by the defendants for assessment of damages arising out of an undertaking by the plaintiff to pay damages in the event the injunctions applied for were set aside were (i) whether the undertaking applied when the interim injunctions and *Erinford* injunctions were granted by the courts though finally set aside and decisions of which were affirmed by the Federal Court in that leave to further appeal to it was dismissed; and (ii) whether the assessment of damages should wait until the outcome of the arbitration which had hardly started beyond a notice to arbitration issued by the plaintiff.

Held (order accordingly):

(1) The purpose of the undertaking is to mitigate the 'obvious risk of unfairness to the party against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have not been ascertained.' Seeing that the undertaking as to damages from the applicant of an injunction is the 'price the applicant must pay' for the granting of such injunction, there was no cogent reason shown as to why the applicant here should not be held to its undertaking. Bearing in mind that a breach of the undertaking attracts the remedy available for contempt, it had not been shown here how it would be inequitable for the undertaking not to be enforced. (paras 42 & 45)

(2) There were no merits in the plaintiff's argument that Star Media could not move this court for the plaintiff's undertaking to pay damages to be enforced merely because Star Media had not applied for the *ad interim* injunction to be set aside. The whole purpose of the undertaking given by the plaintiff was precisely because the application could not be heard immediately and the plaintiff itself had asked for an *ad interim* injunction against their undertaking to pay damages for any losses that Star Media may suffer arising out of the *ad interim* injunction. To interpret otherwise

would be to render the undertaking ineffectual and toothless as invariably the court would grant an *ad interim* injunction until the matter could be heard *inter partes* and if the plaintiff's argument was correct, then it would be a *carte blanche* for the plaintiff to do so with impunity and immunity against any and all claims for damages when the injunction application was finally dismissed on the OSs applications as here. (paras 58 & 59)

(3) There was no need for the court to make a finding that the *ad interim* injunction and *ad interim Erinford* was wrongly or incorrectly granted. That was because of the very nature of the *ad interim* orders which were given pending the hearing proper of the applications for the injunctions, to preserve *status quo* and without delving into the merits of the applications as yet. It could not be just because the *ad interim* injunctions were granted by the court then the plaintiff could not be made to honour its undertaking in paying damages to Star Media. To hold otherwise would require a party like the defendant here to have to appeal against the *ad interim* injunction whilst awaiting the *inter partes* hearing of the applications for the injunction and the *Erinford* injunctions. Such a proposition ought to be dismissed for its absolute absurdity and impracticability. (paras 60, 62 & 63)

(4) Granted that the OSs herein were initiated pursuant to s. 11 of the Arbitration Act 2005 allowing parties to apply for any interim measure at the High Court. The courts at all levels had decided that in respect of the issue of the call on the bank guarantee, there was nothing unconscionable about it. In the absence of fraud or unconscionability, the demand on the bank guarantees must be allowed for otherwise the instrument of a bank guarantee would be meaningless. The underlying dispute between the parties *vis a vis* whether there was a breach of the sale and purchase agreement ('SPA') was not an issue that was relevant for the purpose of determining the validity of the call on the bank guarantee. That issue would have to be decided at the arbitration but in the meanwhile, if the plaintiff had not shown unconscionable conduct on the part of Star Media, then the demand on the bank guarantee was valid and the sums guaranteed would have to be released. There was no justification for postponing the assessment of damages until the outcome of the arbitration was realised for to do so would set a dangerous precedent that there was no pain in providing an undertaking to make good losses suffered by the defendant until the final outcome was realised. (paras 66-68 & 72)

(5) The fact that the final outcome of the arbitration may very well be in favour of the plaintiff where Star Media is ordered to repay back the bank guarantee sum it had earlier received, would not qualify to be a special circumstance. There were no special circumstances here and if at all, only circumstances justifying an assessment of damages based on the conservative method of the interest which Star Media would have earned if the bank guarantee sum had been obtained soon after the call on the banks to pay until after the plaintiff had exhausted all avenues of appeal and the guarantee sum was then released to Star Media. Star Media was within their legal right to apply for assessment of damages without waiting for the outcome of the arbitration. It had been established here through every tier of appeal that the injunction applications in the OSs dismissed by the High Court was rightly decided and the decision was affirmed in the Court of Appeal and by the Federal Court when it dismissed the leave application. There was thus nothing premature but everything proper for Star Media to apply for assessment of damages pursuant to the plaintiff's undertaking given to the High Court. (paras 76, 77 & 81-83)

(6) The fact that the bank guarantee sum of RM50,000,000 was not released would mean that the plaintiff did not have to service any interest in the said sum until it was released and the fact that the defendant had been prevented from receiving the said sum would mean that it would be deprived of the interest which it could have earned had it received the said sum and put the same in fixed deposit at least. The plaintiff's gain was the defendant's loss. Thus, the plaintiff could not be flippant about the defendant's loss but be fastidious when it came to its own gain. Sun Media was claiming merely based on what it would conservatively have earned from interests for the said sum in their accustomed rates with their banks. There was no good reason why Sun Media should be deprived of interest that it would otherwise have earned had it not been for the *ad interim* injunction and the *ad interim Erinford* injunction. The assessment of damages here based on the interest that Star Media would have earned was neither too far fetched not fanciful but every bit foreseeable and fair. (paras 86, 89, 91 & 95)

Case(s) referred to:

Cheltenham and Gluocester Building Society v. Ricketts And Others [1993] 4 All ER 276 ***(refd)***

Clough Engineering Limited v. Oil and Natural Gas Corporation Limited [2008] FCAFC 136 ***(refd)***

F Hoffmann-La Roche & Co AG And Others v. Secretary of State for Trade and Industry [1974] 2 All ER 1128 ***(refd)***

Goo Sing Kar v. Dato' Lim Ah Chap & Ors [2013] 2 CLJ 936 CA ***(refd)***

GS Gill Sdn Bhd v. Descente, Ltd [2010] 5 CLJ 613 FC ***(refd)***
Gumusut-Kakap Semi-Floating Production System (L) Ltd v. Sabah Shell Petroleum Company Limited (No 2) [2017] 1 LNS 945 HC ***(refd)***
Jones And Others v. Secretary Of State For Energy And Climate Change And Another [2014] 3 All ER 956 ***(refd)***
Kenwood Electronics (M) Sdn Bhd & Anor v. Profile Spec (M) Sdn Bhd & Ors (1) [2007] 1 LNS 17 HC ***(refd)***
Les Laboratoires Servier And Another v. Apotex Inc And Others (No 2) [2009] IP & T 600 ***(refd)***
Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd [2012] 1 LNS 830 CA ***(refd)***
P Aker Flowerbulbs Pty Ltd v. Coulter [2004] 212 ALR 606 ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***
SmithKline Beecham Plc And Others v. Apotex Europe Ltd And Others [2006] 4 All ER 1078 ***(refd)***
Soo Boon Siong v. Saw Fatt Seong & Ors [2008] 1 CLJ 365 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 11
Rules of Court 2012, O. 29 r. 1(2A)(d), (e)

For the plaintiff - Wong Rhen Yen & Sharon Chong; M/s Dennis Nik & Wong
For the 1st defendant - Wong Guo Bin & Izzuddin Zahidi; M/s Izral Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng J:

Parties And Disputes

[1] The key issue in these two related applications by the defendants for assessment of damages arising out of an undertaking by the plaintiff to pay damages in the event the injunctions applied for are set aside is whether the undertaking applied when the interim injunctions and *Erinford* injunctions were granted by the courts though finally set aside and decisions of which were affirmed by the Federal Court in that leave to further appeal to it was dismissed.

[2] Related to that is whether the assessment of damages should wait until the outcome of the arbitration which had hardly started beyond notice to arbitration issued by the plaintiff.

[3] The subsidiary issue is the rate at which the interest should be imposed for the period in which the bank guarantee sum could not be released by the banks as the injunctions were in place either as *ad interim* or *Erinford* injunctions depending on the point in time and period of time when either injunction was operative.

[4] For ease of reference, the first defendant, Star Media Group Berhad, in both Originating Summons No: WA-24C(ARB)-11-02-2018 ("OS 11") and WA-24C(ARB)-12-02-2018 ("OS 12") (collectively referred to as "OSs") will be referred to as "Star Media" or the "defendant". The second defendant in OS 11 and OS 12 shall be referred to as AmBank and UOB respectively.

[5] The plaintiff, Jaks Island Circle Sdn Bhd ("Jaks") had opposed both the applications for assessment of damages by Star Media. The applications are in encl. 62 for the AmBank Guarantee in OS 11 and encl. 55 for the UOB Guarantee with respect to OS 12.

Previous Determinations

[6] The defining milestones in the chronology of events have been culled from the plaintiff's narration in its written submissions filed.

[7] On 23 February 2018, the plaintiff initiated proceedings herein to restrain Star Media from receiving the bank guarantees in the sum of RM25,000,000 each from AmBank and UOB.

[8] It is admitted that the plaintiff had given its undertaking as to damages that Star Media may suffer arising out of the injunction applied for, in its affidavits in support of the injunction applications dated 23 February 2019.

[9] On 26 February 2018, the High Court granted the plaintiff an *ad interim* injunction ("*ad interim* HC injunction") pending disposal of the OSs.

[10] Learned counsel for the plaintiff said it is pertinent to note that Star Media did not file any application to set aside the *ad interim* injunction in the OSs.

[11] On 12 July 2018, the plaintiff's OSs were dismissed with costs ("High Court Order").

[12] It was further highlighted that the High Court did not make any orders enforcing the plaintiff's undertaking as to damages.

[13] Dissatisfied with the decision of the High Court, the plaintiff on 13 July 2018 appealed against the High Court Order *vide* Court of Appeal Civil Appeal No. W-02(C)(A)- 1477-07-2018 and Civil Appeal No. W-02(C)(A)- 1478-07-2018 (collectively referred to as "the civil appeals").

[14] Star Media also filed a cross-appeal on the ground that the High Court ought to have ordered the plaintiff to make good on its undertaking as to damages. The cross-appeal was subsequently withdrawn at the hearing of the appeal. Learned counsel for Star Media said the withdrawal was on the

A understanding given by the plaintiff that it may proceed with an application for assessment of damages in the High Court if the plaintiff's appeal to the Court of Appeal was unsuccessful.

[15] Pending the hearing of the plaintiff's civil appeals, the plaintiff applied for an *Erinford* injunction before the High Court to restrain Star Media from
B receiving payment under the bank guarantees pending the disposal of the civil appeals ("HC *Erinford*").

[16] On 17 July 2018, at the first case management for the HC *Erinford*, the High Court granted an *ad interim* HC *Erinford* injunction pending the disposal
C of the *inter partes* hearing.

[17] On 23 July 2018, the HC *Erinford* was heard and dismissed by the High Court with costs.

[18] This did not deter the plaintiff and with dogged determination, it applied on 25 July 2018 to the Court of Appeal for a similar *Erinford*
D injunction pending disposal of the civil appeals ("COA *Erinford*").

[19] On 27 July 2018, the Court of Appeal dismissed the COA *Erinford* with costs.

[20] As endurance is often regarded as a virtue against the setbacks in life,
E the plaintiff pommel itself to pursue further and exhaust all avenues of appeal.

[21] On 29 July 2018, the plaintiff filed a motion for leave to appeal to the Federal Court against the Court of Appeal's decision in dismissing the COA *Erinford vide* Federal Court Civil Application No: W-08(i)-391-07-2018 and
F W-08(i)-392-07-2018 (collectively referred to as "FC civil leave *Erinford* applications 391 and 392").

[22] To prevent as it were the horse from bolting, the plaintiff applied for an *Erinford* injunction at the Federal Court to restrain Star Media from
G receiving payment under the bank guarantee pending disposal of civil applications 391 and 392.

[23] The civil appeals were heard on 14 November 2018. The Court of Appeal dismissed the plaintiff's civil appeals and affirmed the High Court Order dated 12 July 2018 ("COA Order").

H **[24]** The plaintiff then made an oral application for a fresh *Erinford* injunction pending its leave to appeal to the Federal Court. This was dismissed by the Court of Appeal.

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[25] Dissatisfied with the decision of the Court of Appeal, the plaintiff on 16 November 2018 filed a motion for leave to appeal to the Federal Court against the COA Order in dismissing the civil appeals *via* Federal Court Civil Application Nos: W-08(f)-569-11-2018 and W-08(f)-571-11-2018. (collectively referred to as "FC civil injunction leave applications 569 and 571")

[26] Having filed civil applications 569 and 571 in the Federal Court, the FC civil leave *Erinford* applications 391 and 392 in relation to the COA's refusal to grant *Erinford* injunction became redundant and was withdrawn on 19 November 2018.

[27] The plaintiff thereafter obtained an interim injunction from the Federal Court pending the disposal of civil applications 569 and 571.

[28] On 7 January 2019, the Federal Court dismissed the plaintiff's civil applications 569 and 571 with costs ("FC Order").

[29] Truly it is a case where no stones had been left unturned and having exhausted all avenues, the curtain must finally fall with the caption "The End"; a cryptic reminder that the most important thing in life is not to have won but to have fought well.

[30] Reality sank in and with no impediments even over the horizon, the bank guarantees in the sum of RM25,000,000 each was subsequently released to the Star Media on 9 January 2018 by AmBank and UOB following the FC Order.

Principles And Deliberations

[31] It was argued by the plaintiff that the High Court when dismissing its application for the injunction did not specifically make an order for damages to be assessed.

[32] The assessment of damages is pursuant to the undertaking given to the court by the plaintiff and unless the court had ordered that there be no assessment of damages for reasons that it would invariably give, the defendant Star Media is entitled to hold the plaintiff to its undertaking and to pray that it should make good its undertaking to pay damages arising from the loss suffered by Star Media because of the *ad interim* orders.

[33] Acting on an abundance of caution, the defendant Star Media had in fact cross-appealed to the Court of Appeal on enforcing the undertaking as to damages and that cross-appeal was withdrawn only upon the consent and agreement of the plaintiff that Star Media is entitled to file an application to enforce the undertaking given by the plaintiff. This is reflected in para. (e) of the Court of Appeal Order dated 14 November 2018.

[34] Given that plaintiff had already acknowledged by way of the Court of Appeal Order, Star Media's right to file the application herein despite not filing any application to set aside the interim injunctions, I agree with the defendant that the plaintiff is barred and estopped from raising any dispute as to the propriety or validity of the application to enforce the undertaking pursuant to the Court of Appeal Order.

[35] The further arguments would be explored below with respect to the need to file an application to set aside the *ad interim* injunction.

[36] In *Kenwood Electronics (M) Sdn Bhd And Anor v. Profile Spec (M) Sdn Bhd and Others (Part 1)* [2007] 1 LNS 17; [2007] MLJU 92, it was held as follows:

> [12] Since the order granting the injunction is specifically based upon a plaintiff obtaining the injunction undertaking to abide by any order made as to damages in the event the plaintiff's claim fails, *no further order need to be made at trial as to whether an assessment of damages is necessary. In the ordinary course, a party acting in good faith should be able to agree to reasonable damages, and no formal application or order from the Court is necessary* (emphasis added)

[37] Here the two OSs had been disposed of with finality as all avenues of appeal have been exhausted. There is no good reason to bar the defendant Star Media from making these applications for assessment of damages.

Whether The Undertaking As To Damages Ought To Be Enforced When There Was No Application By The Defendant Star Media To Set Aside The Ad-interim Injunction

[38] The undertaking as to damages was given by the plaintiff to the court when it applied for an injunction and until the hearing of the application, an *ad interim* injunction was granted to preserve the *status quo*. The undertaking given by the plaintiff is to pay the defendant here, Star Media, damages in the event that Star Media would have suffered because of the injunction.

[39] The requirement of an undertaking is a deterrent against any applicant perfunctorily obtaining one either *ex parte* or by way of an *ad interim* order pending the hearing of the *inter partes* application or as in here, until the OSs are heard or in some cases, until the writ action or arbitration is heard.

[40] Often times the facts would not have been ascertained yet but the applicant is contending that it would suffer irreparable harm which cannot be compensated by money in the event that it should prove to be successful at the *inter partes* hearing or at the trial or arbitration. It is a way of addressing the competing interest of the parties in the meanwhile in a way that would be fair and reasonable to the parties.

[41] Peter Gibson LJ in *Cheltenham and Gluocester Building Society v. Ricketts And Others* [1993] 4 All ER 276 explained the requirement of an undertaking in the context of an injunction application as follows:

> The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for its grant was originated by the Court of Chancery as an adjunct to the equitable remedy of an injunction. *There is an obvious risk of unfairness to a respondent against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have not been ascertained. The order might subsequently prove to have been wrongly made but in the meantime the respondent by reason of compliance with the injunction may have suffered serious loss from which he will not be compensated by the relief sought in the proceedings*. The risk of such injustice is greater when the interlocutory injunction has been granted *ex parte*. The risk is particularly great with *Mareva* injunctions, granted as they are almost invariably *ex parte*, and frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets: such injunctions can have the effect of ruining a thriving business or of otherwise causing substantial loss to the respondent and were vividly described by Donaldson LJ in *Bank Mellat v. Nikpour* (1985) 2 FSR 87 at 92 as being, with the *Anton Piller* order, one of the law's 'two nuclear weapons'. *The courts are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse*.
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> The usual form of undertaking (which was in substance that given by the building society in the present case) is – 'to abide by any order which this court may make as to damages in case this court shall be of the opinion that the respondent shall have suffered any by reason of this order which the applicant ought to pay'.
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> The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way. The power to enforce the undertaking being incidental to the power to grant an injunction (see *Re Hailstone* (1910) 102 LT 877 at 880), the discretion will be exercised in accordance with ordinary equitable principles (see, for example, *Spry Equitable Remedies* (4th edn, 1990) pp 638-645). *The undertaking is given to the court and not the respondent, who can ask the court to enforce it but has no right to its enforcement or any right to damages until the discretion is exercised in his favour and damages are awarded*.

The law was stated by Lloyd LJ (with whom Stocker LJ and Sir George Waller agreed) in *Financiera Avenida v. Shiblaq* [1990] CA Transcript 973 thus:

> Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. *The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or*

> *otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion*. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, *the second question is whether the defendant has suffered any damage by reason of the granting of the injunction.* Here ordinary principles of the law of contract apply both as to causation and as to quantum (per Lord Diplock in *F Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361) ... In a simple case the trial judge may be able to deal with causation and quantum himself as soon as he has exercised his discretion. But in a more complicated case it may be necessary for him to order an inquiry as to damages either before himself, or before some other judge or before the master or registrar. Very occasionally he may find it necessary to leave over the exercise of the discretion.
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> (emphasis added)

[42] The above principle was adopted and applied by the Federal Court in *GS Gill Sdn Bhd v. Descente, Ltd* [2010] 5 CLJ 613; [2010] 4 MLJ 609.

[43] Whilst I accept the fact that the undertaking as to damages was given to the court and not to Star Media and so the court retains the absolute discretion whether or not to enforce the undertaking, the plaintiff has not shown why its undertaking given to the court should not be enforced. Bearing in mind that a breach of the undertaking attracts the remedy available for contempt, it has not been shown here how it would be inequitable for the undertaking not to be enforced.

[44] In *F Hoffmann-La Roche & Co AG And Others v. Secretary of State for Trade and Industry* [1974] 2 All ER 1128, Lord Diplock stated:

> The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All that it can do is to refuse that application if he declines to do so. The undertaking is not given to the defendant but to the court itself. *Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempt*; but the court exacts the undertaking for the defendant's benefit. *It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so* …" (emphasis added)

[45] Seeing that the undertaking as to damages from the applicant of an injunction is the "price the applicant must pay" for the granting of such injunction, there is no cogent reason shown as to why the applicant here

should not be held to its undertaking. See: *SmithKline Beecham Plc And Others v. Apotex Europe Ltd And Others* [2006] 4 All ER 1078. After all the purpose of the undertaking as explained by the Federal Court in *GS Gill Sdn Bhd* (*supra*) is to mitigate the "obvious risk of unfairness to the respondent against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have not been ascertained".

[46] The relevant dates for the undertaking would be when the *ad interim* injunction was in force from 26 February 2018 until 12 July 2018 and the *ad interim Erinford* from 17 July 2018 till 23 July 2018.

[47] The plaintiff submitted that the enforcement of its undertaking as to damages ought not to be enforced because the *ad interim* injunction and the *ad interim Erinford* were correctly granted. The *ad interim* injunction and *ad interim Erinford* had lapsed or terminated upon the dismissal of the OSs and the dismissal of the *inter parte Erinford*. There were no findings by the High Court that the injunction was wrongly granted.

[48] It must be remembered that in the present case there was no *ex parte* application made but rather an *ad interim* injunction pending its hearing *inter partes* in the OSs. In *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83; [2002] 3 MLJ 1, the Court of Appeal was dealing with an *ex parte* injunction that had not been applied to be set aside. It observed at pp. 92 & 93 (CLJ); pp. 8-9 (MLJ) as follows:

> However, if the defendant wants to set aside the *ex parte* order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside or not, if it has not lapsed. *If, in the meantime, the ex parte order has lapsed, the court should nevertheless hear the application, not for the purpose of setting it aside or not, because it has lapsed, but for the purpose of determining whether that ex parte order should or should not have been made in the first place. This is necessary in order to determine whether damages should be awarded or not* ….
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> *The learned judge also made an order that the appellant makes good its undertaking as to damages. Again, with respect, for the same reasons given in the preceding paragraph, such an order should not have been made*. The fact that an *ex parte* order lapses automatically after 21 days does not mean that the defendant is automatically entitled to damages. The question is should the *ex parte* order have been made at all? *Only if it should not, then the order for assessment of damages should be made. That has not been decided. There was not even an application for that purpose*. (emphasis added)

[49] Therefore the principle of having to set aside an *ex parte* injunction first before an assessment of damages may be made has no application in the present case.

[50] Likewise the Court of Appeal in *Middy Industries Sdn Bhd & Ors v. Arensi-Marley (M) Sdn Bhd* [2012] 1 LNS 830; [2013] 3 MLJ 511 followed the same approach as follows:

> [22] In order to enforce the said undertaking as to damages, *the ex parte order in question must first be discharged or set aside by the court. The appellants should have made an application to that effect to the court.* Such an application is essential for the purpose of determining whether the said *ex parte* order should or should not have been made in the first place. If the answer is in the negative, then such determination is essential to determine the issue of assessment of damages to be awarded to the other party who has suffered such damages. *The appellants, without putting forward any application to discharge or set aside the ex parte order must have accepted that the said order was properly taken out. When this is so, they must be excluded from claiming damages for the period when it existed* (see *Elias bin Mooin & Anor v. Dato' Zainal bin Abidin Johari* [1997] 3 CLJ 455; [1997] 5 MLJ 359).
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> [23] Learned counsel for the appellants complained that it took almost a year since the respondent (the plaintiff) obtained the *ex parte* injunction order on 14 May 2002 till the time when the *inter parte* application for injunction was finally dismissed on 28 April 2003; and it would be a serious miscarriage of justice if the appellants (the defendants) upon being victorious in the interlocutory *inter parte* injunction stage as well as the trial proper, is prohibited from enforcing the undertaking given by the respondent (the plaintiff).
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> [24] The question of 'serious miscarriage of justice' does not arise if the appellants (the defendants) had taken the correct steps in enforcing the said undertaking as to damages as stated in the earlier *ex parte* order on the ground that the *ex parte* order was wrongly granted or it should not have been granted at all in the first place. (emphasis added)

[51] See also the Court of Appeal case of *Soo Boon Siong v. Saw Fatt Seong & Ors)* [2008] 1 CLJ 365; [2008] 1 MLJ 27. Learned counsel for the plaintiff said that the principle applicable by extension is that the defendant Star Media should have applied for the *ad interim* injunction and the *ad interim Erinford* granted to be set aside.

[52] However there is a flaw in that reasoning as the whole purpose of *ad-interim* injunction and an *ad interim Erinford* is to maintain the *status quo* until the injunction application may be heard after the parties have exhausted their affidavits. Imagine for a moment that Star Media must apply to set aside the *ad interim* injunction; that would entail the application to be heard first and before that could be heard another *ad interim* injunction would have to be granted to preserve the *status quo*.

[53] The arguments and applications for an *ad interim* injunction would go on *ad nauseam* for if the defendant consent to the application on the ground of expediency as administratively the affidavits could not be exhausted in a day, then they cannot be seen to be applying to set aside the *ad interim* injunction and if they object to it, then the defendant would be seen to be unduly difficult and in any event the court would for expediency grant it subject to the undertaking of the plaintiff until the application is heard *inter partes*. It would be a case of "head I win" and "tail you lose" kind of argument! The same would apply to an *ad interim Erinford* injunction.

[54] The fact that the court grants the *ad interim* injunction is precisely because the application cannot be heard immediately as both parties would need to file their affidavits; the defendant in opposition and the plaintiff in reply.

[55] It must not be forgotten for a moment that when the *ad interim* injunction was granted the merits of the application had not been considered yet - it is only for maintaining the *status quo* pending the hearing proper *inter partes* of the injunction application.

[56] It is precisely for this reason that the undertaking is exacted of the plaintiff so that any losses suffered by the defendant may be made good by the plaintiff who had asked for the *ad interim* order until the opportune time to hear the OSs on the merits.

[57] In *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd (supra)* at p. 7 the Court of Appeal observed as follows with respect to an application for an *ex parte* injunction which had not been heard *inter partes* yet:

> Bear in mind that the application was still before him, alive and pending. **He clearly had the jurisdiction to consider whether or not to grant an *ad interim* injunction pending the hearing *inter partes* of the application**. From my own experience, quite often parties would agree to such an order or **the defendant would give an undertaking to maintain the *status quo* pending the hearing of the application *inter partes*. But even if they do not agree, the court has the jurisdiction to make such an order**. (emphasis added)

[58] I find no merits in the plaintiff's argument that Star Media cannot move this court for the plaintiff's undertaking to pay damages to be enforced merely because Star Media had not applied for the *ad interim* injunction to be set aside. The whole purpose of the undertaking given by the plaintiff is precisely because the application cannot be heard immediately and the plaintiff itself had asked for an *ad interim* injunction against their undertaking to pay damages for any losses that Star Media may suffer arising out of the *ad interim* injunction.

[59] To interpret otherwise would be to render the undertaking ineffectual and toothless as invariably the court would grant an *ad interim* injunction until the matter can be heard *inter partes* and if the plaintiff argument is correct, then it would be a *carte-blanche* for the plaintiff's to do so with impunity and immunity against any and all claims for damages when the injunction application is finally dismissed on the OSs applications as here!

Whether There Is A Need For A Finding From The Court That The Ad Interim Injunction Was Wrongly Granted

[60] There is no need for the court to make a finding that the *ad interim* injunction and *ad interim Erinford* was wrongly or incorrectly granted. That is because of the very nature of the *ad interim* orders which were given pending the hearing proper of the applications for the injunctions, to preserve *status quo* and without delving into the merits of the applications as yet.

[61] It is different from an *ex parte* application where the requirements of a full and frank disclosure as well as any facts that may cause the court not to grant the injunction has to be clearly set out as required under O. 29 r. 1(2A) of the Rules of Court 2012. The plaintiff applicant is required to state "any answer by the other party (or which he is likely to assert) to the claim or application" by reason of O. 29 r. 1(2A)(d) of the Rules of Court 2012. The plaintiff should also disclose to the court "any facts which may lead the court not to grant the application *ex parte* or at all" by reason of O. 29 r. 1(2A)(e) of the Rules of Court 2012.

[62] It cannot be just because the *ad interim* injunctions were granted by the court then the plaintiff cannot be made to honour its undertaking in paying damages to the defendant Star Media.

[63] To hold otherwise would require a party like the defendant here to have to appeal against the *ad interim* injunction whilst awaiting the *inter partes* hearing of the applications for the injunction and the *Erinford* injunctions. Such a proposition only needs to be stated to be dismissed for its absolute absurdity and impracticability.

Whether The Applications For Assessment Of Damages Pursuant To The Undertaking Given By The Plaintiff Is Premature

[64] The plaintiff submitted that on 6 March 2018, its previous solicitors had issued a notice of arbitration to Star Media. Star Media *via* their solicitors had then replied on 8 March 2018. However to-date the arbitration has not progressed beyond the plaintiff's proposal of the names of arbitrators to constitute the arbitration tribunal.

[65] The plaintiff further submitted that the delay was because Star Media has not responded to its proposed arbitrators named. Surely that cannot be a good reason for not proceeding will all due diligence with the arbitration for another party's lack of response cannot effectively stall an arbitration unless the agreement to arbitrate is so vague as to fail to provide for the relevant rules under which the arbitration is to be held.

[66] Granted that the OSs herein were initiated pursuant to s. 11 of the Arbitration Act 2005 allowing parties to apply for any interim measure at the High Court. The courts at all levels had decided that in respect of the issue of the call on the bank guarantee, there is nothing unconscionable about it.

[67] In the absence of fraud or unconscionability the demand on the bank guarantees must be allowed for otherwise the instrument of a bank guarantee would be meaningless and not worth the paper it is written on where commercial certainty is concerned.

[68] It is true that the courts did not make any decision on the underlying dispute between the parties *vis-à-vis* whether there was a breach of the sale and purchase agreement dated 19 August 2011 ("SPA"). That is because that issue is not relevant for the purpose of determining the validity of the call on the bank guarantee. That issue would have to be decided at the arbitration but in the meanwhile if the plaintiff has not shown unconscionable conduct on the part of Star Media, then the demand on the bank guarantee is valid and the sums guaranteed would have to be released.

[69] It has often been said that the instrument of an irrevocable, unconditional on-demand bank guarantee is a method the parties have agreed with respect to apportioning risk when a dispute should arise as it has invariably arisen in this case under the SPA. This vehicle of an unconditional on-demand bond as an instrument of risk allocation was observed in the Australian case of *Clough Engineering Limited v. Oil and Natural Gas Corporation Limited* [2008] FCAFC 136 as follows:

> 57. His Honour considered that **a commercial object of the performance bank guarantees under the Contract was to allocate the risk of a party being out of pocket pending the resolution of a dispute** and that ONGC was entitled to call upon them even where a genuine dispute existed as to whether or not Clough was in breach and whether or not damage had been suffered …
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> ...

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76. Reference was made in *Wood Hall Ltd* 141 CLR 443 to the commercial purpose of the guarantees, which in that case was that they be equivalent to cash: see Barwick CJ (at 445); Gibbs J (at 453); Stephen J (at 457-458).

As Stephen J observed, to introduce a qualification on the entitlement of the owner to call upon the performance guarantees (at 457): ... *would be*
B *to deprive them of the quality which gives them commercial currency.*

...

79. In *Fletcher Construction* [1998] 3 VR 812, Charles JA at 821 and Callaway JA at 826 recognised that there are generally two commercial reasons why a beneficiary of a performance guarantee may have stipulated for such an
C entitlement. One is to provide security for a valid claim against the contractor. *The second, which is additional to the first, is to allocate the risk between the parties as to who shall be out of pocket pending the resolution of a dispute between them.* Callaway JA went on to observe that it is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as risk allocation device. He went on to say (at
D 827):

> Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees *in lieu* of retention moneys and the like, the latter purpose is often present and commercial practice plays a large part in construing the
E contract. *No implication may be made that is inconsistent with an agreed allocation of risk as to who shall be out of pocket pending resolution of a dispute and clauses in the contract that do not expressly inhibit the beneficiary from calling upon the security should not be too readily construed to have that effect.* As I have already indicated, they may simply refer to the kind of default which, if it is alleged in good faith, enables the
F beneficiary to have recourse to the security or its proceeds.
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> 80. It seems to us that his Honour's reference to a default "alleged in good faith" was intended to embrace the first exception we have set out above. That is to say, the breach relied upon to support a call on the performance guarantee must not be asserted
G fraudulently because the Court will enjoin a party from so acting. *Thus, subject to the exceptions of fraud and unconscionability, the beneficiary of a performance guarantee granted in its favour as a risk allocation device, will be entitled to call upon the guarantee even if it turns out, ultimately, that the other party was not in default*: *Fletcher Construction* [1998] 3 VR at 827. (emphasis added)

H

[70] See generally *Gumusut-Kakap Semi-Floating Production System (L) Ltd v. Sabah Shell Petroleum Company Limited (No 2)* [2017] 1 LNS 945.

I

[71] It is for the parties to sort out the final accounting at the arbitration where all issues in the dispute would be fully ventilated. The sum of RM50,000,000 would have to be accounted for in the final accounting taking into consideration the arbitration tribunal's final award on the respective heads of claims and counterclaims of the parties.

[72] There is no justification for postponing the assessment of damages until the outcome of the arbitration is realised for to do so would set a dangerous precedent that there is no pain in providing an undertaking to make good losses suffered by the defendant until the final outcome is realised.

[73] That can only embolden the party applying for an injunction to painlessly proffer the undertaking knowing that for all practical purposes the court would buy the argument that the assessment should wait.

[74] Whilst the court would retain its discretion with respect to when the assessment should be done, in the absence of special circumstances there is no cogent reason to refuse the assessment when the plaintiff has taken the defendant from the High Court to the Court of Appeal and right up to the apex Federal Court over the issue of payment to be made pursuant to a demand for payment on an irrevocable, unconditional and on-demand bank guarantee.

[75] The Federal Court in *GS Gill (supra)* gave some guidance on the exercise of discretion with respect to assessment of damages pursuant to an undertaking to pay damages in a case where the applicant had failed to obtain the injunction as follows:

> [32] Based on these authorities, it is our considered opinion that whether an inquiry as to damages should be ordered lies with the discretion of the trial judge. It is not for the defendant to insist that such inquiry should be made. The undertaking to damages for an interlocutory injunction is given to the court and not to the defendant. The trial judge is the best equipped to decide on whether to order an inquiry as to damages since he has an adequate knowledge of the facts of the case. He is even allowed to defer the exercise of this discretion until the end of the trial – see *Financiera Avendia v Shiblaq* (unreported, 7 November 1990). *As a general rule, if an interlocutory injunction is wrongly granted, the trial judge should make an order for inquiry to damages on the undertaking given by the plaintiff for the interlocutory injunction.* But if there are *special circumstances,* the trial judge can exercise his discretion to refuse ordering such inquiry. The special circumstances disclosed by Sir Peter Gibson LJ in *Cheltenham & Gloucester Building Society v. Ricketts* can be adopted as a guide but these are not exhaustive. Much depends on the facts and circumstances of each case.

[76] There are no special circumstances here and if at all, only circumstances justifying an assessment of damages based on the conservative method of the interest which Star Media would have earned if the bank guarantee sum had been obtained soon after the call on the banks to pay until after the plaintiff had exhausted all avenues of appeal and the guarantee sum was then released to Star Media.

[77] The fact that the final outcome of the arbitration may very well be in favour of the plaintiff where Star Media is ordered to repay back the bank guarantee sum it had earlier received, would not qualify to be a special circumstance.

[78] Going by the above test that the plaintiff sought to prevail upon and persuade this court, there would effectively be no assessment of damages until the disposal of the arbitration. That would not engender confidence of the business community in relying on bank guarantees as an instrument to allocate risks in the event of a dispute.

[79] In future, the party affected might as well insist on cash payment or retention for a bird in the hand would be worth two in the bush! The instrument of a bank guarantee was agreed upon by the parties as a half-way house where the beneficiary of the bank guarantee has the assurance of payment for default by the obligor and at the same time the obligor performing the works has the requisite cash flow from the works done.

[80] The plaintiff was pursuing its appeals through every tier of the appellate process and the parties had agreed that any assessment should be after all avenues of appeal have been exhausted. That should not now be stretched to until the disposal of the arbitration.

[81] The defendant Star Media is within their legal right to apply for assessment of damages without waiting for the outcome of the arbitration, acting as it did within the guidelines provided by the court of Appeal in *Goo Sing Kar v. Dato' Lim Ah Chap & Ors* [2013] 2 CLJ 936; [2013] 3 MLJ 374 as follows:

> [15] And according to Plowman J in *Ushers Brewery Ltd v. PS King & Co (Finance) Ltd* [1972] Ch 148 at p 154C, the undertaking becomes enforceable by way of an inquiry as to damages in the following sets of circumstances:
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> (a) when the plaintiff has failed on the merits at the trial; or
>
> (b) **when it is established before trial that the injunction ought not to have been granted in the first place**; or
>
> (c) when it is established, after trial, by an unsuccessful defendant, that the injunction ought not to have been given. (emphasis added)

[82] Here, it has been established through every tier of appeal that the injunction applications in the OSs dismissed by the High Court was rightly decided and the decision was affirmed in the Court of Appeal and by the Federal Court when it dismissed the leave application. It is an affirmation that the *ad interim* injunction and the *ad interim Erinford* injunction ought not to have been granted in the first place.

[83] There is thus nothing premature but everything proper for Star Media to apply for assessment of damages pursuant to the plaintiff's undertaking given to the High Court.

Whether The Defendant Star Media Had Proved Any Losses Arising Out Of The Ad Interim Injunction And Ad Interim Erinford Orders

[84] The plaintiff submitted that the interim injunction and *interim Erinford* were sought in good faith to maintain *status quo* and to preserve the substratum of the OSs and the appeals that have been filed. It was not intended to prejudice or cause any hardship on Star Media.

[85] Whilst that may be so, the unintended consequences clearly apparent to the plaintiff, would be that Star Media had been deprived of the use of a substantial sum of RM50,000,000. Surely it cannot be seriously argued that it is no loss to the defendant if the said substantial sum is released a year later but that if it had been released earlier at the point when the injunction was first refused in the High Court, the plaintiff would suffer loss.

[86] Somehow the equation does not add up; the fact that the bank guarantee sum of RM50,000,000 is not released would mean that the plaintiff does not have to service any interest in the said sum until it is released and the fact that the defendant had been prevented from receiving the said sum would mean that it would be deprived of the interest which it could have earned had it received the said sum and put the same in fixed deposit at least. The plaintiff's gain is the defendant's loss; one is the flip side of the other. Thus the plaintiff cannot be flippant about the defendant's loss but be fastidious when it comes to its own gain.

[87] It is only too obvious that the plaintiff's gain in saving on interest on the said sum not released would be the defendant's loss in being deprived of the interest which it could have earned. Of course the interest rates would differ depending on the banks involved and the security that was put up by the plaintiff for the issuance of the bank guarantees.

[88] Star Media is not claiming for what it could have gained had it put the said substantial sum into some investments. In any event, it had not given the plaintiff notice that it was going to do so to alert the plaintiff as to the loss that it would suffer for which the plaintiff would be held liable.

[89] Rather Sun Media is claiming merely based on what it would conservatively have earned from interests for the said sum in their accustomed rates with their banks.

[90] I see no good reason why Sun Media should be deprived of this use of the said sum that it is entitled to have been paid some one year earlier had it not been for the *ad interim* injunction and the *ad interim Erinford* injunction. After all interest is paid for precisely the reason of delay in getting the sum that one is legally entitled. In *P Aker Flowerbulbs Pty Ltd v. Coulter* [2004] 212 ALR 606 the Federal Court of Australia held that there is no reason why a judgment creditor should be deprived of interest that would otherwise automatically accrue from the time that judgment was entered merely because the judgment debtor has been granted a stay of execution.

[91] By the same token there is no good reason why the defendant should be deprived of interest that it would otherwise have earned had it not been for the *ad interim* injunction and the *ad interim Erinford* injunction.

[92] In *Jones And Others v. Secretary Of State For Energy And Climate Change And Another* [2014] 3 All ER 956 the Court of Appeal in UK held that the payment of interest was contingent on the claim being successful and thus the liability to pay interest crystallised when the claim was successful. Here the defendant has been successful at the hearing of the OSs to show to the High Court that the bank guarantee sums ought to be released and this had been affirmed by the Court of Appeal and by the Federal Court as further leave to appeal to the Federal Court had been refused by the Federal Court.

[93] Star Media's practice with respect to prudent stewardship of huge sums received, as stated in its affidavit is that these would be put in cash funds account schemes with RHB Bank Berhad.

[94] Star Media had affirmed an affidavit to state and show how finally when the sum of RM50,000,000 was received it had placed the sum in two tranches of RM807,593.94 with RHB Cash Management Fund 1 with RHB Bank and RM788,735.71 with RHB Bank Islamic Cash Management Fund and earning interest at the rate of 3.74% per annum and 3.66% per annum respectively.

[95] Clearly the assessment of damages here based on the interest that Star Media would have earned is neither too far-fetched nor fanciful but every bit foreseeable and fair.

[96] Even in cases where calculation of damages would be more difficult to be carried out with certainty and precision, "the damages for the lost opportunity were assessable" as evidenced in the case of *Les Laboratoires Servier And Another v. Apotex Inc And Others (No 2)* [2009] IP & T 600, where

the High Court dealt with an application to enforce the undertaking given by the plaintiff in obtaining an injunction to prevent the defendant from entering a new market for the sale of generic medicine. The UK High Court observed as follows at pp. 606 and 607:

> (15)(e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. **A principled approach** in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602). As Lord Diplock explained in *Mallett v. McMonagle* [1969] 2 All ER 178 at 191, [1970] AC 166 at 176:
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> > ... in assessing damages which depend on its view as to what ... would have happened in the future if something had not happened in the past, *the court must make an estimate as to what are the chances that a particular thing … would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards*. (emphasis added)

Pronouncement And Decision

[97] The plaintiff said the rate of interest, if this court is not with them, should be the Maybank's rate of 3.15% per annum which is its fixed deposit rate whereas the defendant Star Media said it should be based on its RHB better rates because of the type of instrument in their normal course of business called the cash management fund that attracted a rate of 3.74% per annum.

[98] The court noted that the parties had left to the court to exercise its discretion with respect to the interest rate to be used. The court applied the rate of 3.5% per annum as reasonable in the circumstances of the case.

[99] Here there is no *ex parte* injunction applied for but there was *ad interim* injunction granted on 26 February 2018 and extended until the disposal of the OSs.

[100] The relevant period is 28 February 2018 which is the date that the banks would have paid under the bank guarantees after the calls were made on 15 February 2018.

[101] I had therefore allowed the period from 28 February 2018 (the date the defendant Star Media would have received the guarantee sum if not for the injunction) to 9 January 2019 (the date after the dismissal of leave by the Federal Court to appeal to it ie, 7 January 2019 and the latter date being the date the defendant actually received the monies) as the relevant period for the calculation of the interest.

[102] The amount calculated for the sum of RM25,000,000 for the relevant period is RM757,534.25 for each of the OS 11 and the OS 12.

[103] I also ordered costs of RM5,000 per application to the defendant Star Media.